SUPREME COURT, U. S.

APR 10 1970

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 852.

HYMAN STERNMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

Petitioner presents its petition for a rehearing of this Court's order dated February 24, 1970, denying the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, and, in support thereof, respectfully shows:

JURISDICTION.

The judgment of the Court of Appeals was entered on June 24, 1969. A timely petition for rehearing was denied on October 17, 1969. A timely petition for writ of certiorari was denied by this Court on February 24, 1970, and a timely motion for extension of time to April 11, 1970, in order to file a petition for rehearing was granted on March 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Whether defendant can be indicted and sentenced for 3 years for contempt under 18 U.S.C., Section 401, a felony, where his only contempt has been a violation of 47 U.S.C., Section 409(l), for which violation specific penalties of a Five Thousand Dollar ($5,000.00) fine or 1 year imprisonment or both are provided under 47 U.S.C., Section 409(m), a misdemeanor.

2. Whether petitioner has been afforded equal protection under the law where he violated 47 U.S.C., Section 409(l) and was sentenced to three years for criminal contempt under 18 U.S.C., Section 401, in the Northern District of Ohio and a person also violating 47 U.S.C., Section 409(l) was only sentenced to prison during the term of the Grand Jury for civil contempt in the Central District of California.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Section 1 of the Fourteenth Amendment to the Constitution of the United States, Section 401 of Title 18 of the United States Code, Section 409 (l) and (m) of Title 47 of the United States Code, which are involved, are set out verbatim in Appendix A, *infra,* page 9.

STATEMENT.

On February 14, 1968, petitioner, Hyman Sternman, was brought before a Federal Grand Jury sitting in the Northern District of Ohio, Western Division to answer questions pursuant to an investigation of the use of telephone communications in gambling activities in violation of the Federal Communications Act, 47 U.S.C. (A4).* Following petitioner's refusal to answer questions on the grounds of possible self-incrimination, he was brought before the District Court, where he was ordered, pursuant to 47 U.S.C., Section 409 (l), granting him immunity (A5), to answer those questions. Petitioner persisted in his refusal and on February 15, 1968, the Grand Jury, despite the obvious enforcement provisions provided in 47 U.S.C., 409 (m), handed down an indictment charging the petitioner with *criminal contempt* for having disobeyed a "lawful order to answer questions to be asked in the conduct of the Grand Jury proceedings" in violation of 18 U.S.C., Section 401. Thereafter, on February 19, 1968, petitioner was brought before the District Court to enter a plea to this Indictment for *criminal contempt. Subsequent to his plea of guilty,* and despite the supposedly criminal nature of the proceedings as indicated by the indictment, petitioner was repeatedly offered opportunities to "purge" himself of the contempt charges brought against him. For example, Mr. Mattimoe, the United States Attorney, stated at one point that, "I have advised Mr. Sternman in the Grand Jury that if he does give answers to those questions, he could possibly purge himself of this charge, and I would like to advise him in open court that if he desires

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* Citations containing the prefix "A" refer to page numbers of the Appendix filed by petitioner in the United States Court of Appeals for the Sixth Circuit, which has been filed as part of the certified record in this court.

to answer questions, the Court will allow us to call the Grand Jury and hold up these proceedings." (A25) To this, the court replied, "I certainly will" (A26). The court's apparent failure to distinguish between civil and criminal contempt is further demonstrated later in the proceedings when he advised petitioner that, "In spite of the Indictment and your plea, I will hold out to you, at least until I get the presentence report, a right to change your mind and purge yourself of contempt" (A27). Finally, at the conclusion of this hearing the court stated, "But I say to you again, the gate is still open" (A28).

Thereafter, on February 21, 1968, the petitioner was brought before the District Court and sentenced to a prison term of three years duration for violation of 18 U.S.C., Section 401 (A30).

The Grand Jury, before which the petitioner declined to answer questions and for which declination petitioner was indicted, was excused on December 19, 1968.

REASONS FOR GRANTING WRIT.

As hereinafter shown, several bases for granting certiorari are found in the various issues raised by this petition for rehearing which were not previously raised in the petition for writ of certiorari: conflict with applicable decisions of this Court and important questions not yet determined by this Court.

1. The decision below is in conflict with this Court's opinion in *Shillitani v. United States of America*, 384 U.S. 364 (1966).

Petitioner was brought before the Grand Jury to testify concerning the widespread use of telephone communications in gambling activities in violation of the Federal Communications Act (A5). Pursuant to 47 U.S.C., Section 409 (l), he was granted immunity against self-incrimination (A5), but nonetheless persisted in refusing to answer questions put to him. 47 U.S.C., Section 409 (m) sets forth specific penalties for violation of Section 409 (l), not to exceed Five Thousand Dollars ($5,000.00) in fines, or more than one year imprisonment or both, and characterizes such violation as a misdemeanor. Petitioner strongly urges that the criminal contempt indictment and three year prison sentence imposed by the District Court are excessive and in direct conflict with this Court's admonition in *Shillitani*, where the opinion states at page 371:

> "* * * This limitation accords with the doctrine that a court must exercise '(t)he least possible power adequate to the end proposed.'".

This admonition is especially pertinent to the instant case where the penalties for contemptuous conduct in violation of 47 U.S.C., Section (l) are mandatorily prescribed in 47 U.S.C., Section 409 (m). Accordingly, where sanc-

tions for contempt have been specifically provided by Congress, and the District Court has imposed a penalty far in excess of that provided for by the applicable law, the question of whether the rule enunciated in *Shillitani* has been violated is an important question to be reviewed by this Court.

2. In *Shillitani,* this Court held that imprisonment for contempt must be viewed as remedial if the court conditions release upon the contemnor's willingness to testify before the Grand Jury. The test applied by this Court in *Shillitani,* to determine whether the punishment is intended to operate coercively rather than punitively is: "what does the court primarily seek to accomplish by imposing sentence?" In the instant case, the District Court's clear purpose, as indicated by the record, was to coerce the petitioner into answering questions before the Grand Jury, notwithstanding the criminal contempt indictment. Petitioner was repeatedly offered the opportunity to purge himself of contempt, *even after* he had pled guilty to the indictment and had been sentenced to a three year prison term for his refusals. Thus, the District Court employed criminal contempt proceedings in an attempt to achieve the stated purpose of coercing petitioner into complying with its order, yet, at the same time, the Order itself, did not contain a purge clause. This procedure is in direct conflict with decisions of the Court of Appeals for the Fifth Circuit. In *Southern Railway Company v. Lanham,* 403 F. (2d) 119 (5th Cir., 1968) the court stated at page 124:

> * * * Although the entitling of the order or recitals contained in the order may be considered, * * * the appellate court on review must determine whether the contempt is civil or criminal in the light of the nature and purpose of the punishment. *Shillitani v. United States,* 1966, 384 U.S. 364, 369, 86 S.

Ct., 1531, 1535, 16 L. Ed. (2d) 622; see *Stewart v. Dunn*, 5th Cir. 1966, 363 F. (2d) 591, 600, n. 5. The substance of the contempt rather than its form is our guide. * * *

See also: *Scott v. Hunt Oil Company*, 398 F. (2d), 810 (5th Cir., 1968).

The case of *In re: Ruby Lazarus*, 276 F. Supp. 434 (1967), involved identical proceedings held before the United States District Court, Central District of California. There too the District Court was faced with a recalcitrant witness who, after being granted immunity under 47 U.S.C., Section 409 (l), refused to testify before the Grand Jury regarding the very same gambling activities investigation about which petitioner refused to testify. The District Court, in accordance with the doctrine propounded in *Shillitani*, imposed the sanction of imprisonment conditioned upon the defendant's compliance with the order to testify. At page 448 the Court said:

> The only problem we now have is the choice of sanctions and that problem was solved for us by the Supreme Court two years ago. The teaching of *Shillitani* is that; following the doctrine of exercising "(t)he least possible power adequate to the end proposed," the court should imprison the witness for a period not exceeding the duration of the term of the Grand Jury but until his compliance with the orders of the Court by giving answers to the Grand Jury questions.
>
> We strongly admonish the witness Lazarus that the conditional imprisonment imposed upon him is for the obvious purpose of compelling him to obey the order to testify before the Grand Jury. As a result, "he carries the key of his prison in his own pocket." If he had chosen to obey the order he would not have faced jail. And the sentence is not by way of punishment but solely to secure answers to the Grand Jury questions.

In the case of *National Union of Marine Cooks and Stewards v. Arnold,* 348 U.S. 37 (1954) this Court held that where persons comparably situated have been treated differently under the law, as in the case of petitioner and Ruby Lazarus, the question of equal protection under the law becomes an issue.

Petitioner, therefore, contends that in light of the cases cited, the prison sentence of three years was excessive and discriminatory.

In view of the apparent confusion extant in the application of criminal and civil contempt proceedings for conduct before Grand Juries, the question of the extent of sanctions which should be imposed for defiance of orders to answer questions is an important question which should be decided by this Court in accordance with the principles enunciated in *Shillitani.*

CONCLUSION.

For the foregoing reasons, this petition for rehearing of the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD I. STILLMAN,
Attorney for Petitioner.

Of Counsel:

CREIGHTON E. MILLER.

Certificate of Counsel.

The undersigned hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

EDWARD I. STILLMAN,
Attorney for Petitioner.

APPENDIX A.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

1. United States Constitution, Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 18 U.S.C. § 401:

§ 401. Power of court.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

3. 47 U.S.C. § 409 (l) and (m).

(l) No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpena of the

Commission, whether such subpena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(m) Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, schedules of charges, contracts, agreements, and documents, if in his power to do so, in obedience to the subpena or lawful requirement of the Commission, shall be guilty of a misdemeanor and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $100 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment. June 19, 1934, c. 652, Title IV, § 409, 48 Stat. 1096; July 16, 1952, c. 879, § 16, 66 Stat. 721; Aug. 31, 1961, Pub. L. 87—192, § 4, 75 Stat. 422.